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Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

WILLIAM JAMES DIESTEL,
Petitioner,

v.

THE OKLAHOMA DEPARTMENT OF CORRECTIONS, AND THE STATE OF OKLAHOMA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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At the Petitioner's trial for first degree malice aforethought murder, evidence was presented that he was not legally sane at the time of the killing. The State's mental health expert evaluated Petitioner on the issue of insanity but declined to render an opinion as to whether Petitioner knew the difference between right and wrong at the time of the killing. Lay testimony was presented by the State by witnesses who observed Petitioner in the moment's prior to the homicide, but who had never seen Petitioner before that day. Petitioner's jury was instructed on the insanity defense, but not the consequence of a verdict of not guilty by reason of insanity. The Oklahoma Court of Criminal Appeals held in response to a challenge to the sufficiency of the evidence rebutting the insanity defense that Petitioner had not met his burden of proof raising a doubt of his sanity and therefore the state's evidence proved Petitioner's guilt beyond a reasonable doubt.

QUESTIONS PRESENTED FOR REVIEW

I. On a mixed question of fact and law does a Petitioner have to show that the state court's determination of his claim violated both 28 U.S.C. § 2254(d)(1) and (d)(2), or is a showing that the state court's factual findings were incorrect under § 2254(d)(2) a sufficient ground to warrant habeas relief?

II. If on a mixed question of fact and law a habeas reviewing court determines that the state court's factual finding is incorrect, is the state court's legal conclusion entitled to the deferential standard

under the AEDPA, or should the federal court engage a *de novo* review of the legal conclusion?

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William James Diestel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The opinion issued by the United States Court of Appeals for the Tenth Circuit is published, *Diestel v. Workman,* 506 F.3d 1249 (10th Cir. 2007) and is reproduced in the appendix to this petition. Mr. Diestel is now incarcerated at Cimarron Correctional Facility in Cushing, Oklahoma. This facility is a private prison contracted to house Oklahoma inmates. Therefore, the named Respondents are the Oklahoma Department of Corrections and the State of Oklahoma, not the Warden of the facility.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered November 1, 2007. No Petition for Rehearing was filed. On January 24, 2008, the Honorable Stephen Breyer, Associate Justice of the Supreme Court of the United States, granted an extension of time within which to file a petition for Writ of Certiorari extending to and including March 28, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. AMEND. V provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

> presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. XIV, § 1, provides, in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

William James Diestel suffers from severe paranoid schizophrenia. That fact remains uncontested in this case. (Hall Tr. 15)(Smith Tr.14-15)(Call Tr. 11-15)[1].

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[1] Pages from the trial transcripts will be designated as (Tr.). The transcript of the testimony of the medical experts, Dr. John R. Smith, Dr. Therese Hall and Dr. John Call are individually bound. Citations to those transcripts will be designated by the name of

The other uncontested fact in this case is that Mr. Diestel, known to his family as Bill, shot and killed Doug Casey on October 27, 2000, in Ardmore, Oklahoma[2]. At the time of the homicide Mr. Diestel believed Casey was the reincarnation of the evil Emperor Nero[3] and had done several things around his home and place of business in Carmello, California, including raping a woman, setting a fire, and putting graffiti around his workplace, (Court's Exhibit 2, pp. 11-12)(Court's Exhibit 4, pp. 9-10)(Tr.III 581-584)(S.Tr.7-8).[4] At trial the defense presented evidence to support a not guilty by reason of insanity defense[5].

While the opinion written by the Tenth Circuit Court of Appeals sets out in detail the facts of the case and the testimony offered at trial on the issue of the

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the witness and the page number (i.e. Smith Tr. 1). Finally the sentencing transcript will be referred to as (S.Tr.)

[2] Mr. Diestel was tried and convicted of first degree malice aforethought murder in violation of Okla. Stat. tit. 21, §701.7.

[3] Five books were found in Mr. Diestel's truck when he was arrested; "Nero: Reality and Legend," "Nero, the End of the Dynasty," "I'm Your Jesus of Mercy," "The Answer, The Holy Bible" and "Embraced by the Light." (Tr.II 387-388)

[4] Mr. Diestel gave sworn testimony at the sentencing hearing and described his hallucination and delusions and what he believed to be true when he came to Oklahoma to find Doug Casey. (S.Tr. 4-41)

[5] Oklahoma follows the two prong test for insanity commonly referred to as the McNaghten Rule. *Regina v. McNaghten*, 10 Cl and FM. 200, 8 Eng. Rep. 718 (1843).

insanity defense, it is vitally important that the facts bearing on the insanity issue are crystal clear as it is the state court's factual findings (in the context of the sufficiency of the evidence challenge under *Jackson v. Virginia*[6]) as it relates to that evidence that is central to the issue raised herein.

A. Facts of the homicide.

In October of 2000 Mr. Diestel drove from California to Oklahoma to find Mr. Casey in order to capture him and make him atone for his sins. (Hall Tr.13) On October 27, 2000, Mr. Diestel stopped at the home of Helen Scott to ask if she knew where to find the Casey residence. (Tr.II 235) A short time later he arrived at the Casey home where he spoke to Carolyn Casey, Doug Casey's mother. (Tr.II 437-441) Ms. Casey told Mr. Diestel that Doug Casey was at work at the Chickasaw Point Golf Course. Mr. Diestel ultimately arrived at the golf course and was advised that Mr. Casey would get off work at 3:00 pm. (Tr.II 245-247) Testimony was presented that Mr. Diestel stopped to eat at the restaurant in the clubhouse while he waited for Mr. Casey to get off work. (Tr.II 254-257)

Doug Casey "clocked out" for the day along with Terry Gable between 2:30 and 3:00 pm. (Tr.II 271) They headed for their cars that were parked just east of the maintenance building when Mr. Diestel appeared and confronted Mr. Casey asking "Do you remember me?" (Tr.II 276) In what was described as a

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[6] 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

"split second" Mr. Gable heard Mr. Casey exclaim "Oh Shit!" and he began running away from Mr. Diestel. (Tr.II 276-277) Mr. Diestel fired three shots then stopped. (Tr.II 279) He then fired what was described as a second "volley" of shots although later testimony showed that a total of four rounds were fired. (Tr.II 279-280)(Tr.II 345) One bullet hit Mr. Casey in the neck severing the carotid artery. (Tr.II 455) Mr. Diestel then got into his car and left the golf course.

A few minutes later Mr. Diestel was stopped by Sergeant Duke Remington of the Kingston Police Department after being notified about the shooting. (Tr.II 356) Upon his arrest Mr. Diestel told law enforcement that he shot Mr. Casey because he had set wild fires and raped a girl in California. (Tr.II 360) Mr. Diestel inquired about Mr. Casey's condition indicating that he did not intend to kill him. (Tr.II 377-378)

B. Expert testimony supporting the insanity defense.

Dr. Therese Hall, a Forensic Psychologist who holds a Ph.D in clinical psychology as well as a Jurist Doctorate degree, evaluated Mr. Diestel while he was at Eastern State Hospital for a pre-trial competency evaluation. (Hall Tr. 9) Dr. Hall began her tenure at Eastern State Hospital treating people who were there for what she referred to as the "NGRI" program. (Tr.10) Dr. Hall served in the capacity of the Chief Forensic Evaluator until April of 2001. (Hall Tr.10) At the time of Mr. Diestel's trial she had testified in thirty (30) to forty (40) trials for both the State of Oklahoma and for criminal defendants. (Hall Tr.11)

Dr. Hall first examined Mr. Diestel on November 9, 2000, for a determination of competency. (Hall Tr.12) During the course of that evaluation Dr. Hall spoke with Mr. Diestel, reviewed medical records and interviewed Mr. Diestel's relatives. In his interview with Dr. Hall, Mr. Diestel related to her that over the ten year period prior to coming to Oklahoma he had become convinced that Mr. Casey was a demon named "Nero" who had been setting fires, raping women and committing acts of vandalism in California. (Hall Tr. 13) At times Mr. Diestel had visions of angels, and a vision of Jesus Christ who told him to "go on a mission to cast down this demon." (Hall Tr.13) Although Mr. Diestel did not specify the method he was supposed to use to cast down the demon he was told that he should render him helpless but not kill him. (Hall Tr.14) Mr. Diestel also told Dr. Hall that he was instructed to carry out his mission quickly while President Clinton was still in office because President Clinton was going to pardon him.

Dr. Hall diagnosed Mr. Diestel with paranoid schizophrenia, which she described as being out of touch with reality most commonly due to hallucinations and/or delusions. (Hall Tr. 15) Those "hallmarks" of the disease explain Mr. Diestel's belief that there was a demon named "Nero" who was committing bad acts. While a person is delusional his perception of right and wrong can be affected. (Hall Tr.17)

Based on Dr. Hall's review of the records and the interviews she conducted, she testified that there is no reason not to believe that Mr. Diestel was suffering from paranoid schizophrenia on the day of the

homicide. (Hall Tr. 18) Although suffering from paranoid schizophrenia does not necessarily equate to being insane, Dr. Hall rendered an opinion that she had no reason not to believe that Mr. Diestel was insane on October 27, 2000, when he shot and killed Mr. Casey. (Hall Tr.19) The fact that Mr. Diestel was able to plan the trip from California to Oklahoma, be coherent and effectively search for Mr. Casey, and can remember all of his actions did not affect Dr. Hall's opinion as to Mr. Diestel's state of mind the day of the homicide.

The second expert witness called by the defense in this case was Dr. John R. Smith. Dr. Smith is a medical doctor who holds a degree in psychiatry. Listed among Dr. Smith's numerous accomplishments and vast experience are his professorships at both the University of Oklahoma School of Medicine where he was a full professor of clinical psychiatry and at the University of Oklahoma School of Law where he taught a course entitled "Psychiatry in the Law" for the last twenty-five (25) years. (Smith Tr.5) Dr. Smith has testified in numerous criminal trials.

Dr. Smith interviewed Mr. Diestel on January 31, 2001, in Marshall County. (Smith Tr.6) In preparation of that interview Dr. Smith talked to Mr. Diestel's mother and reviewed a letter she wrote to a psychiatrist prior to the shooting describing Mr. Diestel's delusional mental state. (Smith Tr. 8) He also reviewed information about the homicide itself. During that interview Dr. Smith conducted a "mental status examination" of Mr. Diestel and talked to him about the shooting. (Smith Tr.9)

Dr. Smith testified that in talking with Mr. Diestel about the shooting his version of events was consistent with police reports. (Smith Tr.9) Mr. Diestel believed "delusionally" that Mr. Casey became the spirit embodiment of Nero.[7] Mr. Diestel believed that if he did not bring down the evil spirit, Nero, who had manifested himself in the body of Mr. Casey, the demon would bring destructiveness to the world and to Mr. Diestel's family. (Smith Tr.9) Dr. Smith indicated that such beliefs are characteristic of paranoid schizophrenia which is characterized by organized delusions which are often of a religious nature or "persecutory" in their content. (Smith Tr. 10) Mr. Diestel also suffered from hallucinations that took on the form of angels or "something supernatural". (Smith Tr. 12) The voices told him that his delusions were true and that he was correct in his belief that Mr. Casey was evil. (Smith Tr. 13) This state was potentially exacerbated by Prozac, which Mr. Diestel had been erroneously prescribed by a physician in California prior to the crime. (Smith Tr.19)

In regard to the fact that witnesses had testified that Mr. Diestel had made plans, been able to locate Mr. Casey and appeared calm and coherent before, during and after the shooting, Dr. Smith testified that those things were not only consistent, but ordinary. (Smith Tr.14) Relying on the "Diagnostic and

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[7] That Mr. Diestel had become focused on Nero was more understandable to Dr. Smith after he reviewed a video tape of a Discovery Channel program about the "Book of Revelations" that contained information about Nero the historical figure. (Smith Tr. 23)(Defendant's Exhibit 11).

Statistical Manual of Mental Disorders" published by the American Psychiatric Association, Dr. Smith testified that paranoid schizophrenia does not interfere with a person's organizational or cognitional abilities. (Smith Tr. 14) Further, he testified that the descriptions given by the witnesses who saw Mr. Diestel on October 27, 2000, were completely consistent with paranoid schizophrenia. (Smith Tr. 68)

In regard to whether Mr. Diestel knew the difference between right and wrong at the time of the shooting, Dr. Smith testified that the fact that Mr. Diestel believed that he was saving his family and saving the world by exorcising an evil spirit indicated he did not have an "ordinary man's" concept of right and wrong. Due to his mental illness, he could not distinguish between right and wrong at the time of the crime. (Smith Tr. 17) Dr. Smith was adamant about Mr. Diestel's mental illness not being the product of malingering. (Smith Tr. 22) The State's cross-examination of Dr. Smith began with questioning intended to cast doubt on Mr. Diestel's sincerity about what he reported to Dr. Smith. (Smith Tr.28) The majority of the State's cross-examination focused on that theme repeating that information regarding the hallucinations and delusions came from Mr. Diestel and was therefore unreliable in what could only be an attempt to call into question the diagnosis of paranoid schizophrenia. (Smith Tr. 34-39) Throughout his testimony Dr. Smith remained consistent and positive about his diagnosis.

C. Expert testimony presented by the State to rebut the insanity defense.

The State called Dr. John A. Call who is a forensic psychologist to testify that he had evaluated Mr. Diestel and had formed an opinion about his mental state at the time of the homicide. (Call Tr.4-5) (Call Tr. 11) Dr. Call agreed that Mr. Dietsel might have been suffering from paranoid schizophrenia on that day. (Call Tr.15, 24, 26) He further testified that a person suffering from that disease **might** be able to distinguish between right and wrong.[8] (Call Tr.11) The State never asked Dr. Call whether Mr. Diestel could distinguish between right and wrong at the time of the crime. At the conclusion of Dr. Call's testimony on cross-examination, the defense asked the question as to whether Mr. Diestel was insane at the time of the crime. **Dr. Call refused to express an opinion on that issue.** (Call Tr. 32)

D. Testimony by lay witnesses relevant to the insanity defense.

Several witnesses were called by the State who had brief encounters with Mr. Diestel just prior to the shooting. Helen Scott testified that Mr. Diestel came to her door and asked if she knew where the Caseys lived. (Tr.II 235) Ms. Scott directed him to a specific area where she believed they lived. (Tr.II 235) That was the extent of her interaction with Mr. Diestel.

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[8] That testimony by Dr. Call was consistent with what Dr. Hall and Dr. Smith had previously told the jury.

Charles Wayne Canady was the cashier at Chickasaw Pointe Golf Course the day Mr. Diestel arrived asking about Doug Casey. (Tr.II 240) When asked whether Mr. Casey worked at that golf course Mr. Canady had a hard time understanding because Mr. Diestel was slurring his words and appeared nervous. (Tr.II 240) Wesley Chaney, a cart attendant, walked up to the cashier counter as Mr. Diestel and Mr. Canady were talking. He too observed Mr. Diestel to be nervous and slurring his speech. (Tr.II 247) Ultimately Mr. Canady realized who Mr. Diestel was looking for, told him where he could find Mr. Casey, and pointed him in the right direction. (Tr.II 241) This encounter only lasted for a matter of minutes.

Meloney Verlock, a kitchen worker and bar cart driver for the golf course, testified that Mr. Diestel went into the restaurant in the club house and ordered something to eat. (Tr.II 254) Ms. Verlock testified that Mr. Diestel gave her the "creeps" that day. (Tr.II 255) Although she could identify Mr. Diestel at trial she could not describe what he was wearing or any other details about his appearance on October 27, 2000. According to Ms. Verlock's testimony Mr. Diestel ordered two sandwiches and two beers.

APPELLATE AND POST-CONVICTION PROCEEDINGS

Mr. Diestel perfected a direct appeal to the Oklahoma Court of Criminal Appeals filing his brief-in-chief on May 16, 2002. The Court of Criminal Appeals issued an unpublished opinion on November 13, 2002, affirming Mr. Diestel's conviction. One member of the Court issued a dissent. After his

conviction was affirmed by the Oklahoma Court of Criminal Appeals, Mr. Diestel filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Oklahoma. In support of that petition, Petitioner challenged the sufficiency of the evidence proving his sanity at the time of the crime, as well challenging the trial court's failure to instruct the sentencing jury on the consequences of a not guilty by reason of insanity verdict. The case was referred to Magistrate Kimberly E. West on April 2, 2003. The State of Oklahoma filed a response brief on June 9, 2003. Petitioner filed a reply brief on July 23, 2003.

A Report and Recommendation was filed by Judge West on March 16, 2006, wherein she recommended that Petitioner be granted relief because the State failed to disprove the insanity defense beyond a reasonable doubt. The State of Oklahoma filed objections to the magistrate's report on April 12, 2006. The Honorable James Payne issued an order on June 21, 2006, affirming in part and reversing in part the findings and recommendations of the magistrate judge, and denying Petitioner relief.[9] An appeal was then perfected to the Tenth Circuit Court of Appeals on June 30, 2006. Both issues were argued on May 8,

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[9] In rejecting the recommendation of the magistrate and denying relief, the district court observed the following: "In so finding, the Court does not mean to imply that it believes that the evidence at trial established Petitioner's sanity beyond a reasonable doubt, but rather, that it defers to the jury's apparent findings on this issue."

2007. The Tenth Circuit issued an opinion denying Petitioner habeas relief on November 1, 2007.

HOW THE ISSUE WAS DECIDED BELOW

In response to Petitioner's challenge to the evidence presented to rebut his evidence of insanity under *Jackson v. Virginia*, the Oklahoma Court of Criminal Appeals held:

> After a thorough review of the evidence presented by both parties, we find [Mr. Diestel] did not meet his burden of raising a reasonable doubt as to his sanity at the time of the crime. The evidence clearly supports the jury's determination that [he] was sane beyond a reasonable doubt at the time he killed the victim.

(COCA Slip Op. at 12)

In evaluating the state appellate court's finding regarding the evidence presented in support of and rebuttal to the insanity defense, the Tenth Circuit treated the issue as a mixed question of law and fact stating:

> We ask whether the facts are correct and whether the law was properly applied to the facts which is why we apply both 28 U.S.C. § 2254(d)(1) and (d)(2) when reviewing sufficiency of the evidence on habeas.

Diestel, 506 F.3d at 1267 (citation omitted). The court then concluded that: "The question before us is

whether the OCCA's conclusion that the evidence was sufficient constituted an unreasonable application of the *Jackson* standard." Id. (citation omitted) In evaluating the facts and evidence and applying the deferential AEDPA standard, the Tenth Circuit found as follows:

> We do not agree with the first sentence insofar as it could be read to say that Mr. Diestel failed to satisfy his burden of presenting sufficient evidence for a reasonable juror to harbor a reasonable doubt. But even if the statement in that sentence is incorrect, the next sentence—that the evidence supports a finding of sanity beyond a reasonable doubt—correctly addresses the dispositive issue (the sufficiency of the state's evidence). Therefore, we must grant AEDPA deference to the OCCA's ruling in that sentence.

506 F.3d at 1268. (footnote omitted) In its final evaluation the Tenth Circuit found that: "In our view, it was not unreasonable for the OCCA to determine that there was sufficient evidence for the jury to believe beyond a reasonable doubt that Mr. Diestel was legally sane." Id. at 1274.[10]

Interestingly, in a concurring opinion, Judge Henry noted that his concurrence was based on the standard of review requiring deference to the state court's legal

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[10] The Tenth Circuit's opinion does not address the relationship between § 2254(d)(2) and (e)(1) so questions regarding the relationship between those provisions is not raised in this petition.

findings under the AEDPA. *Diestel*, 506 F.2d at 1281-1282.

REASON THE PETITION SHOULD BE GRANTED

The petition should be granted because there has been very little guidance by this Court as to the application of 28 U.S.C. § 2254(d)(2) and what showing a habeas petitioner must make to be entitled to habeas relief under that provision. Further, on a mixed question of fact and law it is unclear whether the federal court's finding that the state court's factual findings were unreasonable under § 2254(d)(2) is sufficient to warrant habeas relief or if the reviewing court must then conduct a § 2254(d)(1) analysis. Finally, once the federal reviewing court determines that the state court's factual findings are incorrect, should the federal reviewing court accord the state court's legal conclusions AEDPA deference, or does the court conduct a *de novo* review?

I. This Court has not expressly stated that an unreasonable factual determination under § 2254 (d)(2) creates an independent ground for relief, and circuit courts have split on the answer.

Since the enactment of the *Anti-Terrorism and Effective Death Penalty Act* in 1996, this Court has devoted a considerable amount of time contemplating and explaining the application of § 2254(d)(1) which relates to state court legal findings, but the Court has remained reticent on the meaning and application of § 2254(d)(2) which addresses state court's factual

determinations.[11] By far the most extensive discussion of § 2254(d)(2) occurred in *Williams v. Taylor*, 529 U.S. 362, 386, 120 S.Ct. 1495, 1509, 146 L.Ed.2d 389 (2000). *Williams* is widely considered the seminal case on the application of § 2254(d)(1). However, the *Williams* Court observed that a separate provision of the statute provides, "...habeas remedy when a state-court decision 'was based on an unreasonable determination of the facts in *light of the evidence presented in the State court proceeding*," citing § 2254(d)(2). Although arguable dicta, the *Williams* court indicated that relief under § 2254(d)(2) is a separate issue from, and not contingent upon, a finding that the state-court's decision was unreasonable under § 2254(d)(1). The Court's statement in *Williams* is consistent with the statutory language of § 2254 (d) written in disjunctive language that states that habeas relief can only be granted if the court finds an unreasonable application of federal law **or** an unreasonable determination of the facts in light of the evidence.[12] In *Wiggins v. Smith*, 539 U.S. 510, 529, 123 S.Ct. 2527, 2539, 156 L.Ed.2d 471 (2003) the Court noted that the state court's erroneous factual finding under § 2254(d)(2) contributed to the objective unreasonableness of the state court's legal conclusion. In the context of an

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[11] This case involves only record evidence presented to the jury at trial.

[12] See Justin F. Marceau, *Deference and Doubt: The Interaction of AEDPA § 2254(D)(2) and (E)(1)*, 82 Tul. L. Rev. 385, 421, n. 190 (December 2007)("From the perspective of habeas corpus practitioners, it would seem dubious to ignore the "or" between (d)(1) and (d)(2) and treat (d)(1) as the only vehicle for habeas relief.")

ineffective assistance of counsel claim, the Court suggested that on a mixed question of law and fact both inquiries must be made, but the legal conclusion is unreasonable if it is based on an incorrect factual determination based on the evidence.

Circuit courts who have considered the issue of whether relief can be granted under § 2254 (d)(2) have arrived at mixed results. In *Rolan v. Vaughn*, 445 F.3d 671, 683 (3rd Cir. 2006) the Third Circuit Court of Appeals affirmed the district court's granting of the writ of habeas corpus finding the state court's factual determination (based on extra-record evidence) on a claim of ineffective assistance of counsel was an unreasonable application of the facts to the evidence presented under § 2254(d)(2) without conducting further analysis under § 2254(d)(1). Likewise, the Fifth Circuit Court of Appeals has acknowledged that the finding of an unreasonable factual determination by the state court under § 2254 (d)(2) justifies habeas relief. *Alexander v. Cockrell*, 294 F.3d 626, 630 (5th Cir. 2002) *citing Childress v. Johnson*, 103 F.3d 1221, 1226, n. 7 (5th Cir. 1997). In *Ben Yisrayl v. Davis*, 431 F.3d 1043, 1051-1052 (7th Cir. 2005) the Seventh Circuit found that when state court's factual finding is unreasonable in light of the evidence presented habeas relief is granted without consideration of the legal conclusion under § 2254(d)(1), but that the constitutional error had to survive the harmlessness standard of *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993).

Alternatively, the Second Circuit Court of Appeals has expressed doubt that an "unreasonable" factual finding alone under § 2254 (d)(2) would be enough for

habeas relief in *Francis v. Stone*, 221 F.3d 100, 115 (2nd Cir. 2000). The Ninth Circuit Court of Appeals has also suggested that a finding under §2254(d)(2) alone is not enough for habeas relief. *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004). The Second Circuit and Ninth Circuit positions are consistent with the Tenth Circuit's opinion in this case finding the factual predicate of a mixed question unreasonable under § 2254 (d)(2), but denying habeas relief because the state court's legal finding under § 2254(d)(1) was reasonable.

The above cited courts have addressed the issues raised herein to some extent, but have reached differing results. As such, this Court needs to provide clarification to the courts and habeas petitioners and practitioners about whether § 2254(d)(2) provides an independent ground for habeas relief, and how that is to be applied to issues involving mixed questions.

II. If the reviewing court finds the state court's determination of the facts to be unreasonable, is the legal conclusion on a mixed question worthy of deference?

In denying relief to Petitioner, the Tenth Circuit indicated that although the state court factual determination appeared to be wrong, relief was not appropriate because the state appellate court applied the proper standard and deference had to be accorded the state's legal conclusion. *Diestel*, 506 F.3d at 1268. However, even if the court's two-prong analysis looking at both § 2254 (d)(1) and (d)(2) was appropriate, there is no way to objectively determine that the state court's legal conclusion on the *Jackson* issue was not

based on the unreasonable and erroneous factual determination under § 2254(d)(2).

The Tenth Circuit abdicated its discretion when it held that the state court's recitation of the proper governing standard was enough to defer to its ultimate legal conclusion despite the fact that the conclusion was based on the state court's erroneous factual finding. The only way to reconcile the erroneous factual determination with the state court's legal conclusion is to find that because Petitioner did not present sufficient evidence to raise doubt as to his sanity, the state's evidence was sufficient to prove sanity beyond a reasonable doubt. That is an entirely different matter than finding, based on the evidence adduced at trial, that Petitioner presented sufficient evidence to raise doubt about his sanity, but the state presented sufficient evidence to rebut the defense beyond a reasonable doubt. The Tenth Circuit believed the later factual determination to be true, but gave deference to the former legal conclusion to affirm Mr. Diestel's conviction. The court's holding was rendered under the belief that it was bound by the state court's legal determination despite the fact that the state court's factual determination was wrong. In other words, Petitioner overcame the § 2254(d)(2) hurdle, but could not overcome the § 2254(d)(1) hurdle simply because the state court had identified the proper standard. Hence, the Tenth Circuit improperly accorded deference to the state court's legal conclusion even though the legal conclusion was based on an unreasonable factual finding.

In writing the dissent in *Uttecht v. Brown*, __ U.S. __, 127 S.Ct. 2218, 2242, 167 L.Ed.2d 1014 (2007),

Justice Stevens observed: "A ruling cannot be taken at face value when it is clear that the reasoning behind that ruling is erroneous in light of our prior precedents." Similarly, the Court stated in *Miller-El v. Cockrell*, 537 U.S. 322, 324, 123 S.Ct. 1029, 1033, 154 L.Ed.2d 931 (2003) that:

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Finally, in *Wiggins*, 539 U.S. at 528, 123 S.Ct. at 2539, the Court observed that even partial reliance on erroneous factual findings "highlight" the unreasonableness of a state court finding.

The Tenth Circuit abdicated its own judgment under the auspice of AEDPA deference when it deferred to the state court's legal conclusion even though it was based on an unreasonable factual predicate. Instead, if it was indeed necessary to conduct the § 2254(d)(1) legal analysis, it should have been a *de novo* review of the already highly deferential *Jackson* standard.

Petitioner submits that the Tenth Circuit's holding is contrary to the limited statements made by this Court addressing the AEDPA deferential standard after the federal reviewing courts make a finding that

the state court's factual findings are unreasonable. If the Tenth Circuit is correct in its holding then federal courts retain no discretion in granting habeas relief in cases where the state court findings are wrong, but its citation to the proper legal standard is enough to provide shelter under the AEDPA's umbrella of deference.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the writ of certiorari should be granted.

Respectfully submitted,

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